UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

STERICYCLE, INC.,	)	
	)	
Respondent,	)	
	)	
And	)	Case Nos. 04-CA-137660
	)	04-CA-145466
	)	04-CA-158277
TEAMSTERS LOCAL 628	)	04-CA-160621
	)	
Charging Party	)	

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION ON REMAND

NOW COMES Stericycle, Inc., Respondent herein, and files this Brief in Support of Exceptions to Administrative Law Judge's Supplemental Decision on Remand, as follows:

STATEMENT OF CASE

Respondent is engaged in the business of providing regulated medical waste and collection treatment services to commercial customers throughout the United States. It operates facilities located in Southampton and Morgantown, Pennsylvania, at which its employees are represented by Teamsters Local 628 (Union) in separate bargaining units. On September 29, 2014, the Union filed an unfair labor practice charge (04-CA-137600) alleging that Respondent had at its Southampton facility violated section 8(a)(5) of the Act by failing to provide certain relevant information and by unilaterally implementing a plan to make retroactive deductions from employees' paychecks to recoup unpaid health care contributions. Additional charges were filed thereafter, and a series of complaints were issued by the Regional Director, culminating in a Second Consolidated Complaint, which issued on March 29, 2016, as further amended on May 16,

2016, and again at the hearing on August 24, 2016. Respondent filed answers, denying the material allegations of the complaints. This matter was heard in Philadelphia, Pennsylvania, before Judge Rosas on August 24 and 25, 2016. On November 10, 2016, Judge Rosas issued his recommended decision finding certain unfair labor practices but dismissing other allegations.

Thereafter, all parties filed timely exceptions with the Board. While these exceptions were pending before the Board, the Board issued its decision in *The Boeing Co.,* 365 NLRB No. 154 (2017), which modified the Board's standards for evaluating whether employment policies violate § 8(a)(1) of the Act. On January 15, 2019, the Board issued a Notice to Show Cause why those complaint allegations alleging that certain employment policies maintained by Respondent should not be severed and remanded to the Administrative Law Judge for reconsideration in light of *Boeing.* The parties submitted responses, and on May 8, 2020, the Board "ORDERED" that the allegations that the work rules - including those relating to the use of personal electronic devices, personal conduct, conflicts of interest, confidentiality of harassment complaints, electronic communications, and camera and video use - have been unlawfully maintained are severed and remanded to Administrative Law Judge Michael A. Rosas for the purpose of reopening the record, if necessary, preparing a supplemental decision addressing those allegations, setting forth credibility resolutions (if necessary), findings of fact, conclusions of law, and a recommended Order." On June 2, 2020, the Regional Director withdrew the allegations in the Consolidated Complaint regarding the use of personal electronic devices (two separate policies), electronic communications, and camera and video use. The Union's appeal of these dismissals was denied. Accordingly, the lawfulness of three policies remained in issue: (1) personal conduct, (2) conflicts of interest, and (3) confidentiality of harassment complaints. The parties submitted supplemental

briefs on these issues. On September 4, 2020, Judge Rosas issued his Supplemental Decision finding that all three policies violated §8(a)(1).

Respondent now files this Brief in Support of Exceptions. As discussed herein, the Board's post-*Boeing* decisions in *Motor City Pawn Brokers, Inc.,* 369 NLRB No. 132 (July 24, 2020) (disparagement of employer's reputation); *G& E Real Estate Management Services, Inc. d/b/a Newmark Grubb Knight Frank,* 369 NLRB No. 121 (July 16, 2020) (conflicts of interest), and *Apogee Retail LLC d/b/a Unique Thrift Store,* 368 NLRB No. 144 (2019) (confidentiality of investigations) are dispositive and all three policies are lawful under *Boeing.* Accordingly, Respondent requests that the corresponding complaint allegations be dismissed.

STATEMENT OF FACTS

A. Background

The Union was certified as the representative of Respondent's Morgantown, Pennsylvania employees in September 2011. The Morgantown plant is a regulated medical waste treatment facility. Regulated medical waste is delivered to the facility, where it is processed, chemically treated, and shredded in a Chemical Clave treatment system that is unique and proprietary to Respondent. The resulting product is placed in containers and disposed of in landfills. (Tr. 34-36, 232, 241). There are approximately 55 employees in the unit. (Tr. 36). The Morgantown collective bargaining agreement was effective from date of ratification (on or about September 6, 2013) through February 29, 2016. (GC Exh. 3; Tr. 37). At the time of the initial hearing, the parties had recently reached a new agreement for Morgantown. (Tr. 36-37). The three remaining challenged policies are set forth in an employee handbook that was distributed to the Morgantown employees in February 2016. (GC Exh. 22).

B. Alleged Unlawful Handbook Policies

The Administrative Law Judge originally found the following policies (italicized provisions) to be overly broad and unlawful under the Board's pre-*Boeing* case law:

1. Personal Conduct Policy

The Morgantown handbook contained the following section regarding "Personal Conduct":

> *In order to protect everyone's rights and safety, it is the Company's policy to implement certain rules and regulations regarding your behavior as a team member. Conduct that maliciously harms or intends to harm the business reputation of Stericycle will not be tolerated. You are expected to conduct yourself and behave in a manner conducive to efficient operations. Failure to conduct yourself in an appropriate manner can lead to corrective action up to and including termination.*
>
> ***The following are some examples of infractions, which could be grounds for corrective action up to and including termination, however this list is not all-inclusive.***
>
> -- Possession, consumption, distribution or sale of alcohol, drugs or illegal substances while on premises, or reporting to work under the influence of the above-mentioned items.
> -- Carrying or possessing firearms or weapons of any kind on the Company's property or while engaged in Company assignments
> -- Theft
> -- Pilfering of waste
> -- Use of profanity or inappropriate language while on Stericycle premises whether on duty or not.
> -- Gambling on Stericycle premises
> -- Acts of violence
> -- *Engaging in behavior which is harmful to Stericycle's reputation*
> -- Falsifying any Stericycle record or report, including but not limited to an application for employment, a time record, a customer record, manifest, invoices, receiving records, etc.
> -- Willfully defacing, damaging, or unauthorized use of Company property or another team member's property
> -- Sleeping on the job
> -- Continued or excessive absenteeism or tardiness
> -- Violation of safety and/or operating rules
> -- Smoking or "Vaping" in "No Smoking" areas
> -- Refusing to follow the directions of a supervisor or otherwise being insubordinate

-- Violation of the Sexual Harassment policy
-- Failure to punch/swipe in and out when appropriate or punching in/out for other team members

(GC Exh. 22, p. 30).

2. Conflicts of Interest

The Morgantown handbook contained the following Conflict of Interest policy:

> *Stericycle will not retain a team member who directly or indirectly engages in the following:*
>
> *-- An activity that constitutes a conflict of interest or adversely reflects upon the integrity of the Company or its management.*
>
> -- An activity in which a team member obtains financial gain due to his/her association with the Company.
>
> -- An activity, which by its nature, detracts from the ability of the team member to fulfill his/her obligation to the Company.

(GC Exh. 22, p. 33).

3. Confidentiality of Harassment Complaints

The employee handbook contained a detailed policy prohibiting harassment of all types, including, but not limited to, sexual harassment. (GC Exh. 22, pp. 8-9). In a separate section, entitled "Retaliation," the handbook provided:

> Stericycle strictly prohibits unlawful retaliation against any team member or applicant for employment who reports discrimination or harassment, or who participates in good faith in any investigation of unlawful discrimination or harassment.
>
> **What action should you take if you feel you have been a victim of harassment or retaliation?**
>
> If you believe you have been the victim of harassment or retaliation of any kind, immediately do the following:
>
> 1. If you feel comfortable doing so, we encourage you to tell the person in no uncertain terms to stop; and

2. Report the incident and the name of the individual(s) involved to your Human Resources Representative. If you cannot report the issue to your Human Resources Representative for any reason, contact the Team Member Help Line at [Phone Number]. The Help Line accepts anonymous complaints of any kind.

All complaints will be promptly investigated. *All parties involved in the investigation will keep complaints and the terms of their resolution confidential to the fullest extent practicable.*

(GC Exh. 22, p. 10).

ISSUES

1. Whether the Respondent's Personal Conduct policy violates §8(a)(1) of the Act? [Exceptions 1, 2, 3, 4, 5, 6, 7, 8, 11, 16, 19, 20, 21, 22]

2. Whether the Respondent's Conflict Of Interest policy violates §8(a)(1) of the Act? [Exceptions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 17, 19, 20, 21, 22]

3. Whether the Respondent's Confidentiality of Harassment Investigations policy violates §8(a)(1) of the Act? [Exceptions 12, 13, 14, 15, 18, 19, 20, 21, 22]

ARGUMENT

A. Prior Board Precedents

At the time that this case was originally heard by the ALJ, the basic inquiry was "whether the [challenged] rules would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enf'd*, 203 F.3d 52 (D.C. Cir. 1999). "In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage Village – Livonia*, 343 NLRB 646, 646 (2004). Unless the rule or policy explicitly restricts section 7 activity, it would be deemed unlawful only if "(1) employees would reasonably construe the language to prohibit

Section 7 activity; (2) the rule was promulgated in response to union activity; (3) or the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647. Although the Board purported to "strike a proper balance between the employees' rights and the Respondent's business justification," *Caesar's Palace,* 336 NLRB 271, 272 (2001), in practice, employment policies were almost always found to be unlawful if they could reasonably be read as restricting section 7 rights, regardless of the strength of the employer's asserted business justification.

B. The Board's *Boeing* Decision.

In *Boeing,* the Board overruled *Lutheran Heritage* and modified its analytical framework with respect to rules that were not adopted in response to, or directly applied to, protected activity, but that could be "reasonably construed" to restrict § 7 activities:

> Under the standard we adopt today, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule. We emphasize that *the Board* will conduct this evaluation, consistent with the Board's "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy," focusing on the perspective of employees, which is consistent with Section 8(a)(1).

In an effort to provide greater certainty, the Board established three categories into which it would place specific types of employment rules and policies. *Category 1* consists of rules that are "lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule." *Category 2* includes "rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications." *Category 3* includes "rules that the Board will designate as *unlawful*

to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule."

In *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019), the Board provided further guidance regarding the decision-making process. "First, it is the General Counsel's initial burden in all cases to prove that a facially neutral rule *would* in context be interpreted by a reasonable employee, as defined above, to potentially interfere with the exercise of Section 7 rights. If that burden is not met . . . [t]he rule is lawful and fits within *Boeing* Category 1(a)." However, "if the General Counsel meets the initial burden of proving that a reasonable employee would interpret a rule to potentially interfere with the exercise of Section 7 rights, the *Boeing* analysis will require a balancing of that potential interference against the legitimate justifications associated with the rule." If "the balance favors the general employer interests over the potential interference with the exercise of Section 7 rights, the rule at issue will be lawful and will fit within *Boeing* Category 1(b)." Finally, "in some instances, it will not be possible to draw any broad conclusions about the legality of a particular rule because the context of the rule and the competing rights and interests involved are specific to that rule and that employer. These rules will fit in *Boeing* Category 2."

The Board further emphasized "that the outcome of this inquiry 'should be determined by reference to the perspective of an objectively reasonable employee who is 'aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA.'"

C. Respondent's Personal Conduct Policy Is Lawful Under The Board's *Motor City* Decision.

In *Motor City Pawn Brokers, Inc.*, 369 NLRB No. 132 (July 24, 2020), the Board recently addressed the proper categorization of non-disparagement policies under *Boeing.* There, the employer's standards of conduct included a rule that prohibited "*Off-duty conduct which can affect*

the Company's credibility or reputation." The employer also maintained a broader non-disparagement policy, which prohibited employees from communicating "to any customer or third party, any disparaging claim, remark, allegation, statement, opinion, comment, innuendo or information of any kind or nature whatsoever, *the effect of or intention of which is to cause embarrassment, disparagement, damage or injury to the reputation, business, or standing in the community of Customers, Employer and/or Related Entities,* and their customers, members, managers, officers, owners, employees, independent contractors, agents, attorneys, or representatives, regardless of whether any such communication is or may be true or founded in facts." (Emphasis added). The Board acknowledged that these policies/rules "would be reasonably interpreted to prohibit or interfere with the exercise of NLRA rights," but concluded that this adverse impact on employee rights was outweighed by the substantial justifications for such policies:

> An employer has a legitimate interest in conveying to employees its expectation that they will perform their jobs in a manner that will do the employer proud, without sabotaging or otherwise impairing its operations. After all, the success--if not the continued existence--of an employer is often dependent on maintaining its reputation with current or prospective customers and preventing the harm to its commercial image from having its products or services publicly disparaged or misrepresented. At the same time, the employer has an interest in ensuring that employees are invested in building a collaborative work environment in which the employer, for whom they work and on whom they depend for their livelihood, can be most successful in advancing its business relationships.

Thus, the Board concluded that policies of this nature fall into *Boeing* category 1(b) and are lawful without further inquiry. Here, the prohibition on conduct that is "harmful to Stericycle's reputation" is indistinguishable from the prohibition in *Motor City* on conduct "which can affect the Company's credibility or reputation." Further, as set forth in the introductory paragraph, the policy is aimed at "[c]onduct that maliciously harms or intends to harm the business reputation of

Stericycle" and employees "are expected to conduct [themselves] and behave in a manner conducive to efficient operations." It also is significant that the challenged rule is located in the middle of a broad range of clearly lawful rules regarding inappropriate employee conduct. *Motor City* is dispositive and requires dismissal of this allegation.

The Judge found *Motor City* to be distinguishable "because the sanctioned policies in that case encompassed only employee communications with customers and third parties, and the business justification cited emphasized the impact on third parties." (JD 4: 37-39). According to the ALJ, Respondent's policies "have a much broader reach" and "could reasonably be read to include communications with not only third parties and customers, but also with and among employees." (JD 4: 41-46). The Judge found the Board's decision in *Union Tank Car Co.,* 369 NLRB No. 120 (2020) to be more on point and controlling. (JD 5: 1-5). The Judge opined:

> The policies at issue here are broad and do not specify whether they apply to statements between employees or customers and third parties. Because the policies are so broad, they could be reasonably interpreted to prohibit communications among employees regarding the terms and conditions of their employment, thus interfering with core Section 7 activity. These policies also embrace conduct, rather than just communications, that is harmful to the Company's reputation. Such a restriction could reasonably be interpreted to include other protected activities such as participating in a strike or some other form of protest of working conditions.
>
> In contrast with the business considerations that attach to policies prohibiting disparaging statements to customers and third parties, none have been shown to exist with respect to policies infringing on protected communication among employees. Moreover, the Company's policies stress that the failure to comply could result in termination. Such adverse consequences impose a chilling effect on employees' Section 7 rights, with no substantial business justifications. As the Board held in *Union Tank Car Co.*, there is no business justification that would outweigh an infringement of this nature on such core Section 7 rights. Id.

(JD 5: 5-21).

The Judge's analysis is misplaced and represents the type of strained interpretation that

Boeing was aimed at eliminating. First, the decision in *Union Tank Car* turned wholly on the explicit inclusion in the rule of communications among *employees.* Thus, the rule prohibited "[s]tatements either oral or in writing, which are intended to injure the reputation of the Company or its management personnel with customers or *employees.*" (Emphasis added). It is clear from the majority and dissenting opinions that had the rule ended at any point before the word "employees," it would have been found lawful. Thus, the majority emphasized:

> The rule's prohibition against statements *to other employees* "that are intended to injure the reputation of the Company or its management personnel" significantly restricts Section 7 rights. "It is axiomatic that discussing terms and conditions of employment with coworkers lies at the heart of protected Section 7 activity." [Citation omitted]. Such discussions are often inseparably linked to complaints about the employer itself and the managers who establish and enforce those terms and conditions. [Citation omitted]. The rule thus potentially interferes with the exercise of the right to engage in activities that lie at the core of Section 7 of the Act.

Respondent's rule makes no mention whatsoever of communications between *employees.* Rather, it speaks exclusively in terms of "conduct" and "behavior" which is harmful to Stericycle's "business reputation." The Judge effectively rewrites the rule to include communications with employees because the rule does not explicitly exclude communications with employees. This is the type of linguistic revisionism that *Boeing* eschews. Similarly, the Judge's suggestion that by emphasizing "conduct" rather than "communications," the rule might be construed to encompass engaging in a strike or work-related protest borders on the ludicrous. Indeed, in *Motor City*, the employer maintained two separate rules, one that focused on conduct and one that focused on communications. The Board found both rules to be lawful.

Respondent requests that the Board dismiss the allegations regarding Respondent's Personal Conduct policy.

D. Respondent's Conflict of Interest Policy Is Lawful Under The Board's *Newmark Grubb* Decision.

The Morgantown handbook contains a Conflict of Interest policy, which prohibits any *activity that constitutes a conflict of interest or adversely reflects upon the integrity of the Company or its management.* The Judge analyzed the prohibition on any "activity that . . . reflects upon the integrity of the Company or its management" in conjunction with Respondent's Personal Conduct policy and found it to be overly broad and unlawful. For the reasons discussed above, the Judge's analysis is faulty and should be rejected.

With respect to the prohibition on any "activity that constitutes a conflict of interest," Respondent contends that the Board's recent decision in *G& E Real Estate Management Services, Inc. d/b/a Newmark Grubb Knight Frank*, 369 NLRB No. 121 (July 16, 2020) is controlling. In that case, the Board considered the following Outside Employment and Business Activities policy:

> In order to ensure regulatory compliance and avoid potential conflicts of interest, employees are prohibited--without prior written notice to and formal written approval from the General Counsel or Head of Compliance--from participating in outside work activities that might present a conflict of interest (including employment relationships, consulting relationships and service on boards of directors of corporations, educational institutions and charitable/not-for-profit institutions) and from making non-passive investments.

The Board concluded that this policy was lawful:

> The policy self-evidently aims to prevent business conflicts of interest from outside *work activities*--including employment, consulting, or board memberships--not mere membership in outside organizations or run-of-the-mill volunteering. Accordingly, employees would not reasonably read the rule to extend to union organizing, which is a much different activity than those described by the policy. Moreover, although the rule could conceivably be interpreted to reach holding a leadership position with a union or working for a union for pay, we find that when reasonably interpreted, the rule has no potential to interfere with such activities. Holding such positions does not implicate the rule's stated purpose of ensuring regulatory compliance and avoiding conflicts of interest. Policies limiting outside business relationships are common and have no

> reasonable potential to interfere with Section 7 rights. We find this policy is lawful and fits within *Boeing* Category 1(a).

In analyzing this simple conflict-of-interest rule, the Judge acknowledged that at least if read "isolated," Respondent's "Conflict of Interest Policy is reasonably understood to encompass business and financial activities that typically constitute a conflict of interest, rather than all outside activity" because a conflict of interest "in a business environment is reasonably understood to involve some form of additional employment or involvement outside of work that would create a concern of competing commitments." (JD 5: 22-27). Given this finding, one would have expected the Judge to read the cited prohibition in the context of the entire rule to see if this reasonable interpretation was contradicted in some fashion by the overall policy. The Judge, however, did not undertake such an analysis. Instead, he contented himself with comparing Respondent's policy with the *Newmark Grubb* policy:

> The *Newmark* policy specifically applied to outside employment and other business activities. It also listed several examples of proscribed activities (outside employment, consulting, serving on boards, and making non-passive investments). Id. The Conflict of Interest policy here is much broader and does not make any of these specifications, so *Newmark* cannot be dispositive.

(JD 5: 32-36).

This is backwards analysis, pure and simple. The Board did not hold that the policy in *Newmark* represented the universe of lawful conflict-of-interest policies. What the Judge should have done, but didn't, was look at Respondent's policy as a whole. It is not sufficient to say that Respondent's policy is "different" or "broader" than the *Newmark* policy. What is it about Respondent's policy that would cause an employee to reject the normal interpretation of a business conflict of interest in favor of some interpretation that would impact employee Section 7 rights? The Judge doesn't say because there is nothing in the policy that would support such an alternative

interpretation. In fact, the two other provisions of the policy expressly reinforce the normal interpretation. Thus, the policy also prohibits any "activity in which a team member obtains financial gain due to his/her association with the Company" and any "activity, which by its nature, detracts from the ability of the team member to fulfill his/her obligation to the Company."

Here, Respondent has promulgated a "Conflict of Interest" policy, which employees reasonably would understand to deal with their outside financial and business activities. As in *Newmark,* the policy cannot reasonably be read to include union or other protected activities. *Newmark* is dispositive and requires dismissal of this allegation.

E. The Policy Regarding Confidentiality Of Harassment Complaints Is Lawful Under The Board's *Apogee* Decision.

In *Apogee Retail LLC d/b/a Unique Thrift Store,* 368 NLRB No. 144 (2019), the Board overruled its prior decision in *Banner Estrella Medical Center,* 362 NLRB 1108 (2015), which had examined investigatory confidentiality rules on a case-by-case basis. In its place, the Board drew a distinction between rules that require confidentiality only for the duration of the investigation and rules that do not explicitly limit their applicability to the investigation in question. The former fall into *Boeing* category 1 and are deemed lawful without further scrutiny. The latter fall into *Boeing* category 2 and require individualized scrutiny. Although *Apogee* did not involve harassment investigations, the Board placed special emphasis on harmonizing its approach with that of the EEOC:

> The *Banner Estrella* test, which prohibits an employer from adopting investigative confidentiality rules, is inconsistent with the recommendations of the Equal Employment Opportunity Commission. The EEOC endorses blanket rules requiring confidentiality during employer investigations and advocates that employers should adopt such rules. As the EEOC noted in its "*Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*," "[a]n employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible." Such

> confidentiality rules are especially necessary during employer investigation of sexual harassment complaints, where victims of such discrimination are more likely to report abusive behavior if they are assured that their allegations will be investigated in a confidential manner. But assurances of confidentiality cannot be responsibly given unless employers can require confidentiality, and under *Banner Estrella* employers cannot lawfully adopt rules prospectively requiring investigative confidentiality.

It is true here that the policy is silent as to the duration of the confidentiality pledge. Thus, under *Apogee*, it falls into *Boeing* category 2, which requires individualized scrutiny. Nevertheless, it is clear from the discussion by the Board cited above that in the context of harassment investigations, a blanket confidentiality policy is lawful, even if it does not specifically limit the duration of the confidentiality pledge. Initially, Respondent's policy is essentially identical to the EEOC's guidance, which was cited by the Board with approval in *Apogee.* Thus, the EEOC endorses "blanket rules" and states that "[a]n employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible." Respondent's policy states that the investigation will be kept confidential "to the fullest extent practicable." There is no meaningful difference between these standards. Given that the Board in *Apogee* sought to alleviate the conflict between the Board's standards and this EEOC guidance, it would be odd indeed for the Board to nevertheless find unlawful a policy that substantially mirrors the EEOC guidance.

While the section entitled "Retaliation" is separate from the section entitled "Harassment," the two are interrelated and the "Retaliation" provision is expressly directed at employees "who have been the victim of harassment or retaliation of any kind." There is nothing in the provision that would cause an employee to interpret the confidentiality language as extending to any type of complaint other than one of harassment or retaliation. That the policy is not limited to "sexual" harassment complaints does not alter the analysis, as federal and state law prohibit multiple types of discrimination and retaliation, including discrimination and retaliation based on race, national

origin, disability, military service, etc. The policy clearly does not cover complaints regarding wages, benefits, safety, or general working conditions.

Even apart from its *Apogee* decision, the Board has recognized that "employers have a legitimate right to adopt prophylactic rules banning [harassment] because employers are subject to civil liability under federal and state law should they fail to maintain 'a workplace free of racial, sexual, and other harassment.'" *Lutheran, supra*, 343 NLRB at 647 (quoting *Adtranz ABB Daimler-Benz Transportation, N.A., Inc.*, 253 F.3d 19, 27 (D.C. Cir. 2001)). "Title VII [of the Civil Rights Act of 1964] is designed to encourage the creation of antiharassment policies and effective grievance mechanisms." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764 (1998). Where there is no tangible adverse employment action, an employer may assert an affirmative defense if it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and the "employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765. Evidence that the "employer had promulgated an antiharassment policy with complaint procedure" is pertinent to establishing this affirmative defense. *Id.; Debord v. Mercy Health System of Kansas, Inc.*, 737 F.3d 642, 653-654 (10th Cir. 2013).

As evident from the EEOC guidance cited above, one of the elements of an effective harassment policy is the inclusion of a blanket confidentiality provision. "By providing clear direction as to how to report sexual harassment and by including a confidentiality and anti-retaliation provision, [the employer's] policy was reasonably calculated to prevent and promptly correct any sexually harassing behavior." *Id.; see Brink v. McDonald*, 116 F. Supp. 3d 696, 700 (E.D. Va. 2015). "Equal Employment Opportunity Commission guidelines suggest that information about sexual harassment allegations, as well as records related to investigations of

those allegations, should be kept confidential," and "the obligation to comply with such guidelines may often constitute a legitimate business justification for requiring confidentiality in the context of a particular investigation or particular types of investigations." *Hyundai America Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 314 (D.C. Cir. 2015).

The clear intent of Respondent's policy is to protect employees from all forms of harassment and to provide an effective mechanism by which employees who believe they have been subjected to harassment will feel comfortable to report such conduct so that an investigation can be conducted, appropriate remedial action taken, and appropriate protective measures established. Any employee reading the policy would readily understand this lawful purpose, which is further reinforced by the fact that the challenged language appears under the highlighted (bold font) heading: **What action should you take if you feel you have been a victim of harassment or retaliation?** Many employees may be reluctant to report incidents of harassment if their complaints are subject to being revealed throughout the workforce. They may fear embarrassment or possible retaliation by the alleged perpetrator.

The policy does not broadly prohibit employees from discussing issues of harassment or retaliation. Thus, it is limited to internal complaints in which the victim has requested an investigation by Respondent. The policy extends only to the "parties" to the investigation; i.e., the victim, the alleged perpetrator, witnesses who may be interviewed, and the managers and supervisors involved in the investigation. The policy imposes no discipline if confidentiality is not maintained and pledges confidentiality only "to the fullest extent practicable." Finally, while there may be circumstances in which an employee's discussion of a harassment complaint or investigation could be deemed to be protected by Section 7, there are numerous other circumstances in which such discussion would be neither concerted nor protected. All-in-all, the

potential impact of the policy on §7 rights is slight.

The Judge rejected Respondent's contentions because, in his view, requiring confidentiality "to the fullest extent practicable" is "simply too vague," as "[e]mployees may reasonably construe the policy to prohibit them from discussing the events that prompted a complaint and the actions taken by the company in response" and the policy "also can be reasonably construed to preclude communications with union representatives, for which there is no legitimate business justification." (JD 6: 19-25). The Judge discounted the EEOC guidance on the grounds that this "advisory stresses the importance of an employer's duty to maintain the confidentiality of victims and witnesses of harassment to ensure that employees are comfortable speaking up," but "does not even remotely suggest, however, that employees who file such complaints should also be bound to bury their concerns in perpetuity." (JD 6: 33-38). Finally, the Judge opined: "The flip side, of course, is that an employee who chooses to confer with other employees about their complaints after an investigation has concluded assumes the risk of retaliation. The duty, according to the EEOC, extends to the employer, not the employee." (JD 6: 38-41).

The Judge's analysis is clearly flawed. First, a promise of confidentiality only to "the fullest extent practicable" is not only largely indistinguishable from the EEOC guidance, but it is intended to make employees aware that complete confidentiality may not be possible. It is not clear how else that point can be stated. Second, the EEOC's recommendation that a blanket policy of confidentiality be maintained is not merely a restriction on the employer. While the employer can certainly restrict the actions of its own managers and supervisors, a policy that imposed confidentiality solely on the employer would not provide any meaningful assurance of confidentiality to either victims or witnesses of harassment. Meaningful confidentiality can be

assured (to the extent possible) only by a policy that applies to all participants in the investigatory process.

Further, harassment investigations, by virtue of the vast legal requirements that surround them, are inherently different from investigations into ordinary rule violations. The Board's requirement that confidentiality during ordinary investigations be limited to the duration of the investigation makes sense because confidentiality during such investigations is largely aimed at preventing intimidation and coaching of witnesses, as opposed to protecting the employee who is the subject of the investigation. In harassment investigations, however, there is a much larger concern. Specifically, confidentiality is important because it also is designed to protect both the alleged victim and the alleged perpetrator. This need for confidentiality does not simply disappear the moment the investigation concludes. An employee who complains about sexual harassment by a supervisor or by co-workers deserves some level of continued confidentiality regardless of the ultimate outcome of the investigation. If a supervisor or co-worker is disciplined or discharged as a result of the investigation, the victim may fear retaliation from others who sympathize with the supervisor or co-worker. Even witnesses may need continued confidentiality as they too can be subject to criticism or retaliation, which often is subtle in nature.

While it is true that there is a level of ambiguity to a policy that requires confidentiality to "the fullest extent possible," it is impossible to write a blanket policy that will account for every conceivable scenario. The Board should not dictate that employers treat employees as children who must be given step-by-step instructions. Employees inherently understand the sensitive nature of harassment investigations and can readily understand that they should be circumspect in what they say regarding such investigations. While a blanket policy of this nature may have some potential minimal impact on the exercise of Section 7 rights, that impact is far outweighed by the

business justification. Importantly, we are dealing here with the facial validity of a confidentiality policy, not its application to specific conduct. Nothing in the policy requires a victim of harassment to bury her concerns "in perpetuity." And if an employer attempts to apply such a confidentiality policy in an overly aggressive manner, the Board may well find a violation. But that is no reason to throw the baby out with the bath water.

Respondent clearly has a substantial and compelling business justification for including a confidentiality provision in its harassment policy. Further, the confidentiality provision adopted by Respondent is narrowly tailored and Respondent's business justification outweighs the limited impact, if any, that this provision arguably might have on the exercise of Section 7 rights. Respondent requests that the Board dismiss this allegation.

CONCLUSION

For the reasons discussed herein, Respondent requests that all remaining complaint allegations be dismissed.

Respectfully submitted this 2nd day of November 2020.

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the forgoing BRIEF IN SUPPORT OF EXCEPTIONS by electronic mail on the following parties:

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